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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ALI H., a Person Coming Under the  
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

ALI H.,

Defendant and Appellant.

D052417

(Super. Ct. No. J216811)

APPEAL from a judgment of the Superior Court of San Diego County, Francis M. Devaney, Judge. Reversed.

Ali H., a minor, appeals a delinquency adjudication designating him a ward of the court under Welfare and Institutions Code section 602, after the juvenile court found true allegations he committed burglary (Pen. Code § 459)<sup>1</sup> and grand theft (§ 487). Ali challenges his wardship adjudication, contending (1) the court erred by admitting

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

improper witness testimony, and (2) the evidence was insufficient to support a true finding on the burglary and grand theft allegations. We conclude that although the court properly admitted the witness testimony, the evidence was insufficient to support the burglary and grand theft true findings. Accordingly, we reverse the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

On June 25, 2007, four boys, including Ali, entered an AT&T store. Two of the boys approached telephones on display for sale. Ali walked to the televisions near the front door and spoke with a staff member. The fourth boy walked around the store, alternating between talking with store employees and standing near the telephones.

AT&T employees Crystal Couture and Mark Escudeo were working at the store at the time. The boys remained in the store for about 30 minutes. They did not attempt to purchase anything and Escudeo thought they looked suspicious. AT&T employees asked the boys several times if they needed help. As the boy who had been wandering around the store approached staff, one staff member noticed two telephones were missing. The staff member yelled, and all four boys ran out of the store. The two telephones had a value of \$1,200.

Police arrested the boys in a parking lot. They had just gotten out of a car when officers arrived. The officers found the two missing telephones in the glove compartment of the car, and scissors and an AT&T brochure in the backseat of the car. Surveillance video confirmed the AT&T employees' testimonies about the location and activities of each boy inside the store.

At trial, the People asked an AT&T employee if he had ever seen the group of boys in the store before. Ali objected, asserting lack of foundation and no discovery. The People replied that the question was relevant to the witness's identification of the individuals. Ali again objected, asserting the testimony called for prior bad acts evidence because the People referred at the readiness hearing to a potential crime at another AT&T store. (Evid. Code, § 1101, subd. (b).) The People argued the testimony was not related to a prior bad act. The court allowed the testimony, and the witness testified he had seen the group in that store and at another AT&T location.

Except for cross-examining the People's witnesses, Ali did not present evidence in his defense and did not testify.

## DISCUSSION

### I

#### ADMISSIBILITY OF EVIDENCE

Ali contends the court erred by admitting the AT&T employee's testimony he previously observed the group of boys in an AT&T store. At trial, Ali objected that the testimony lacked foundation, there was no discovery as to this information, and it was inadmissible evidence of "almost a prior bad act." For the first time on appeal Ali contends the question was compound, overbroad, ambiguous and was improper character evidence.

##### *A. Legal Principles*

"[A]ll relevant evidence is admissible." (Evid. Code, § 351). A trial court has wide discretion in determining relevance under this standard. (*People v. Green* (1980) 27

Cal.3d 1, 19, overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.) Any ruling by a trial court on the admissibility of evidence will not be disturbed on appeal absent an abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.) Similarly, the trial court has discretion to exclude evidence if it determines the prejudicial impact of the evidence outweighs its probative value. (Evid. Code, § 352). Only on a clear showing of abuse of discretion will an appellate court reverse a trial court's determination under Evidence Code section 352. (*People v. Siripongs* (1988) 45 Cal.3d 548, 574.)

Objections raised at trial can provide a basis for appellate review of a newly made contention when the new contention requires consideration of "the same facts and [application of] a legal standard" similar to that required at trial. (*People v. Yeoman* (2003) 31 Cal.4th 93, 117.) However, in criminal cases, an objection at trial is necessary to preserve an issue for appeal because "a 'contrary rule would deprive the People of the opportunity to cure the defect at trial and would "permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal." ' [Citation]." (*People v. Partida* (2005) 37 Cal.4th 428, 434.)

#### *B. Analysis*

Ali has not clearly shown the court abused its discretion by allowing the employee's testimony. The court admitted the testimony as relevant to the witness's knowledge and identification of Ali. (Evid. Code, §§ 351, 1101, subd. (b).) The court also exercised appropriate discretion by allowing the testimony over Ali's objections regarding evidence of prior bad acts. Generally, being present in a store is not improper

or illegal. The court acted within its discretion by refusing to exclude the employee's testimony. (*People v. Siripongs, supra*, 45 Cal.3d at p. 574.)

Ali also forfeited the newly raised contentions that the question was compound, overbroad, ambiguous and character-based. Although we may consider newly raised contentions requiring analysis of the same facts and application of a similar legal standard, Ali's new contentions would have required application of different legal standards at trial. (*People v. Yeoman, supra*, 31 Cal.4th at p. 117.)

After an objection to admittance of evidence of prior bad acts, a trial court inquires about the evidence's relevance to some other fact, such as knowledge or identity. (Evid. Code, § 1101, subd. (b).) However, after an objection to character evidence, a trial court inquires about which party "opened the door" to the character evidence. (*See People v. Lopez* (2005) 129 Cal.App.4th 1508, 1528 [evidence of defendant's good character opens door for prosecution to offer rebuttal evidence].) Additionally, because the objection requirement serves to discourage a defendant from gambling on acquittal and provides the People an opportunity to cure a defect, Ali forfeited the newly raised contentions. (*People v. Partida, supra*, 37 Cal.4th at p. 434.)

## II

### SUFFICIENCY OF EVIDENCE

Ali challenges the sufficiency of the evidence to support the court's true finding on the burglary (§ 459) and grand theft (§ 487) allegations. He asserts no evidence showed he had the requisite specific intent to commit the crimes.

### *A. Standard of Review*

When a defendant challenges a conviction for insufficient evidence, we apply the substantial evidence standard of review. We view the evidence favorably to the judgment and determine whether it discloses evidence that is reasonable, credible, and of solid value, such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "[S]ubstantial evidence" is not " 'synonymous with 'any' evidence.' " (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.) " 'A decision supported by a mere scintilla of evidence need not be affirmed on review.' [Citation] . . . [Any] inferences [relied on by the factfinder] must be 'a product of logic and reason' and 'must rest on the evidence' [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [citations]. " (*Ibid.*) "The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652, *see also* *People v. Cuevas* (1995) 12 Cal.4th 252, 261.)

### *B. Legal Principles*

Because there was no evidence Ali entered the AT&T store with the intent to commit a felony or that he took the telephones, his criminal liability is based on his being an aider and abettor to the crimes. (§ 31.) "[P]roof of aider and abettor liability requires proof in three distinct areas: (a) the direct perpetrator's actus reus--a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea--knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and

(c) the aider and abettor's actus reus--conduct by the aider and abettor that in fact assists the achievement of the crime." (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.) Aider and abettor liability does not require proof of the specific intent that is an element of the underlying offense. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123.) Evidence of an accused aider and abettor's presence at a crime can support a conclusion that the accused is an aider and abettor, but presence alone is insufficient to prove this conclusion. (*People v. Durham* (1969) 70 Cal.2d 171, 181.) Additionally, failing to prevent the commission of a crime is insufficient to establish an accused aider and abettor's actus reus. (*Ibid.*)

### *C. Analysis*

After considering the entire record, we conclude the evidence is insufficient to support the true findings that Ali committed burglary (§ 459) and grand theft (§ 487). Although Ali argues he did not have the specific intent required for burglary and grand theft, his alleged involvement in the crimes was as an aider and abettor rather than as a direct perpetrator. The People did not need to prove Ali's specific intent to enter the AT&T store with the intent to commit theft or to steal the telephones because he was not the direct perpetrator. (*People v. Mendoza, supra*, 18 Cal.4th at p. 1123.) Rather, the People were required to prove beyond a reasonable doubt that (1) the direct perpetrators entered the AT&T store with the intent to commit theft and committed theft; (2) Ali had knowledge of the direct perpetrators' unlawful intent and purpose; and (3) Ali's conduct in fact assisted the direct perpetrators' achievement of the crimes. (*People v. Perez, supra*, 35 Cal.4th at p. 1225.)

We conclude the evidence was sufficient to establish the direct perpetrators' criminal actus reus and that Ali had knowledge of their intent and purpose. However, we conclude the evidence was insufficient to establish beyond a reasonable doubt that Ali's conduct assisted in the commission of the direct perpetrator's crimes.

The evidence showed Ali came into and left the store with the other boys and was arrested with them. The evidence does not prove an affirmative act to assist in achieving the crimes. (*People v. Perez, supra*, 35 Cal.4th at p. 1225.) Although Ali was present in the store when the crime was committed, and he did not prevent the theft, this evidence is not sufficient to satisfy the requirements of being an aider and abettor. (*People v. Durham, supra*, 70 Cal.2d at p. 181.) The record shows Ali was merely watching television in the store; he was not acting suspiciously as a decoy or lookout. Viewing the record as a whole, we conclude the evidence was insufficient to support the true finding that Ali committed burglary and grand theft. (*Roddenberry v. Roddenberry, supra*, 44 Cal.App.4th at p. 652.)

#### DISPOSITION

The judgment is reversed.

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McDONALD, J.

I CONCUR:

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McINTYRE, J.



Nares, J., dissenting:

I conclude that substantial evidence supports the court's true finding on the allegations Ali H. committed burglary and grand theft. Accordingly, I respectfully dissent.

### FACTUAL BACKGROUND

I begin by restating the evidence put forward by the People in this matter, to emphasize the substantial evidence the majority disregards in reversing the judgment in this matter.

On June 25, 2007, four boys, including Ali, entered an AT&T store. Two of the boys approached telephones on display for sale. Ali walked to the televisions near the front door and spoke with a staff member. The fourth boy walked around the store, alternating between talking with store employees and standing near the telephones. AT&T employees Crystal Couture and Mark Escudeo were working at the store at the time.

The boys remained in the store for about 30 minutes. They did not attempt to purchase anything and Escudero thought they looked suspicious. AT&T employees asked the boys several times if they needed help. Escudero then saw one of the boys trying to loosen the security device on the back of one of the phones. As this was happening, the boy who had been wandering around the store went up to Couture and asked her a question. As she was talking to him, she looked over at the boys standing by the phones and noticed two of the phones were missing. She yelled out that the phones

were missing. One of the boys yelled, "[R]un, get out of here, go," and all four boys ran out the door. Ali was the first one to run out of the store. Two phones, totaling \$1,200, were missing.

Police arrested the boys in a parking lot for a T-Mobile store. They had just gotten out of a car when deputies arrived. Police officers found the two missing telephones in the glove compartment of the car and two pairs of scissors and a cut-up AT&T brochure in the backseat of the car. Surveillance video confirmed the AT&T employees' testimony about the location and activities of each boy inside the store.

## DISCUSSION

### *A. Standard of Review*

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the [trier of fact's] duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the [trier of fact], not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] ' "If the circumstances reasonably justify the trier of fact's

findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' ' "  
(*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

In making our determination, we focus on the whole record, not isolated bits of evidence. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1203.) "[W]e do not reweigh the evidence; the credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact." (*People v. Stewart* (2000) 77 Cal.App.4th 785, 790.) We will not reverse unless it clearly appears that on no hypothesis whatever is there sufficient substantial evidence to support the verdict. (*People v. Redmond* (1969) 71 Cal.2d 745, 755; *People v. Stewart*, at p. 790.) This standard of review is applicable to juvenile appeals. (*In re Michael M.* (2001) 86 Cal.App.4th 718, 726.)

#### B. *Analysis*

The prosecution proceeded on an aiding and abetting theory of liability in this case. Aider and abettor liability does not require proof of the specific intent that is an element of the underlying offense. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123.) Rather, "proof of aider and abettor liability requires proof in three distinct areas: (a) the direct perpetrator's actus reus—. . . , (b) the aider and abettor's mens rea - knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor's actus reus - conduct by the aider and abettor that in fact assists the achievement of the crime." (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.) Further, "[u]nlike the act of the direct perpetrator, the act of the aider and abettor

is not inherently criminal. Indeed, the aider and abettor's act may be, and often is, innocuous when divorced from the culpable mental state." (*People v. Mendoza, supra*, 18 Cal.4th at p. 1129.)

It is true that " '[t]he specific intent . . . to commit a robbery cannot be inferred *merely* because of the fact a robbery occurred at a place where [Ali] was present.' " (*People v. Terry* (1970) 2 Cal.3d 362, 401- 402, italics added, disapproved on another point in *People v. Carpenter* (1997) 15 Cal.4th 312, 381-382.) However, it is also the case that his "presence [is] but one factor which, together with others, would support a finding that [he] had the specific intent to rob or to assist in robbery." *People v. Terry, supra*, 2 Cal.3d at p. 402.) While individually insufficient to prove the requisite intent, taken together, "factors for determining aiding and abetting of a robbery include presence at the scene of the crime, companionship, and conduct before and after the crime, including flight. [Citation.]" (*People v. Haynes* (1998) 61 Cal.App.4th 1282, 1294.)

" 'The evidence . . . need not be direct nor extend to every fact and detail. It may be circumstantial and is sufficient, even though slight, if it tend[s] to connect the defendant with the commission of the crime. [Citations.]' [Citation.]" (*People v. Wayne* (1953) 41 Cal.2d 814, 822.)

Here, there is substantial circumstantial evidence to find Ali liable as an accomplice. Ali entered the store with the other three juveniles. While his presence in the store itself was not inherently criminal, the court was entitled to infer from his actions that he was acting as a decoy and/or lookout for the juveniles who actually took the phones. He was in the store for 30 minutes and did nothing but look at television sets by

the front door. He did not purchase anything, attempt to purchase anything, or do anything indicating he was in the store for a valid reason dissociated from the other juveniles' criminal intent. When an AT&T employee yelled that the two phones were missing, one of Ali's accomplices told the boys to run, and Ali was the first to flee the store with the other juveniles. He was arrested with the other juveniles while getting out of a car containing the stolen merchandise. All of this evidence is sufficient to show Ali was complicit in the plan to steal the phones at every step of the crime.

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NARES, Acting P. J.